

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JB Carter Enterprises, LLC dba ATM
Merchant Systems,

Plaintiff

v.

Elavon, Inc.,

Defendant

Case No.: 2:18-cv-00394-JAD-NJK

**Findings of Fact, Conclusions of Law, and
Final Judgment Following Bench Trial**

In response to large-scale data breaches and increased counterfeiting, the debit- and credit-card industry adopted a technology known as “EMV” in October 2015 to authenticate chip-card transactions. Before this industry shift, plaintiff JB Carter Enterprises, LLC dba ATM Merchant Systems (ATMMS), which provides account services like credit-card, ATM, and check-cashing transactions to merchants, retained defendant Elavon, Inc. as its payment processor and linked its software to Elavon’s systems. As the transition to EMV approached, Elavon repeatedly touted its EMV readiness and sold ATMMS payment terminals that it promised would be able to process the EMV transactions. But Elavon’s software was not ready by October 2015, and it decided to shift to different payment terminals than the ones it sold to ATMMS. And though Elavon eventually rolled out the EMV-capable software and swapped out ATMMS’s equipment with substitute devices the following year, the software couldn’t process the type of transactions that ATMMS’s business relied on. Year after year, Elavon kept pushing the date that it planned to offer support for its transactions, but Elavon terminated its contract with ATMMS in 2019 without ever having provided that technology.

ATMMS sued Elavon and proceeded to a non-jury trial on six claims: fraud, negligent misrepresentation, breach of contract, breach of the covenant of good faith and fair dealing (bad faith), intentional interference with contractual relations, and intentional interference with prospective business relations. At trial, ATMMS advanced the theory that Elavon falsely represented that it would—and orally agreed to—provide software and equipment that would allow ATMMS to process EMV-compliant transactions by the EMV-compliance date. It argued that Elavon’s failure to do so halved its business and constituted an intentional interference with its relationships with current and future customers. Elavon, by contrast, sought to show that its EMV-readiness messaging wasn’t meant for ATMMS; it wasn’t responsible for ATMMS’s EMV compliance; the parties never formed a contract; and it never represented that the software that it was developing would be ready by any date certain.

Based on the testimony of five witnesses and voluminous exhibits, I find that ATMMS prevailed on its claim that Elavon negligently misrepresented that it would offer an EMV software solution for customers like ATMMS by the EMV-compliance deadline. But ATMMS’s victory on this claim is a Pyrrhic one because its too-thin damages evidence entitles it to nominal damages only, and all of ATMMS’s other claims fail. I reach these conclusions based on the following findings of fact and conclusions of law.

Findings of Fact

I. The card industry switches to a new standard for payment processing called EMV.

Imagine that a decade ago, a Las Vegas tourist is feeling lucky but just spent her last dollar early in the night. Out of cash, she heads for the nearest ATM with her debit card in hand, swipes the card, and withdraws \$500. After the machine spits out a stack of twenties, she walks into the nearest casino, hoping that her jackpot is minutes away. Days later, she learns that a

1 fraudster had purloined her debit-card number using a skimmer surreptitiously installed on the
2 machine—a device that criminals attach to ATMs to steal the information on a card’s magnetic
3 stripe—and emptied her bank account.

4 To prevent that kind of theft, the debit- and credit-card industry adopted a new standard
5 for payment processing called “Euro, Mastercard, and Visa”—or “EMV” for short.¹ Along with
6 that shift, card companies started adding those small chips onto cards that we’re all now
7 accustomed to inserting or tapping in lieu of swiping the magnetic stripe.² The chips encrypt the
8 card information, complicating swindlers’ attempts to steal card numbers.³ As of October 1,
9 2015, the industry also requires every entity involved in an in-person or “card-present”
10 transaction to maintain devices and software that can read the chips and process the encrypted
11 transaction.⁴ Any entity involved in the transaction that fails to do so runs the risk that the
12 transaction is fraudulent and will have to take the hit of the chargeback.⁵ This transition to EMV
13 was recognized as a major shift in the industry because, before it, the liability for chargebacks
14 was borne by the banks.⁶

19 ¹ ECF No. 136 at 97:13–22; ECF No. 137 at 31:25–32:12. These page-and-line citations come
20 from the official trial transcripts, found at ECF Nos. 136 (trial day 1), 137 (day 2), and 140 (day
21 3).

22 ² ECF No. 136 at 95:19.

23 ³ *Id.*

⁴ ECF No. 136 at 35:20–25.

⁵ ECF No. 137 at 31:25–32:12.

⁶ ECF No. 136 at 96:7–10.

II. ATMMS retains Elavon as its national processor and integrates its customers with Elavon’s services.

Thinking again about our hypothetical tourist at the ATM, though her transaction seems relatively simple, the hardware and software that support those kinds of transactions are anything but. Once she requests the \$500, the ATM sends the request to a “national processor,”⁷ which then forwards the information to the card company (think VISA, MasterCard, etc.) and the bank that issued the card.⁸ They, in turn, approve or deny the request, after which the flow of information reverses—that is, the approval or denial is sent through the national processor back to the ATM.⁹

ATMMS bills itself as a hub connecting requests from people like our tourist with a national processor.¹⁰ According to its founder and CEO Bartus “Bart” Carter, ATMMS provides its clients with both hardware—such as ATMs,¹¹ the point-of-sale (POS) terminals that shoppers insert their card into or tap their card against,¹² or kiosks to get cash or casino chips¹³—and the software that powers consumers’ interactions with the hardware and its ability to communicate with a national processor.¹⁴ ATMMS calls its proprietary combination of hardware and software “Multi-Choice Cash” (MCC).

⁷ *Id.* at 233:10–22.

⁸ *Id.* at 233:22–25.

⁹ *Id.* at 233:7–12.

¹⁰ *Id.* at 18:25–19:1.

¹¹ *Id.*

¹² *Id.* at 28:24–29:21.

¹³ *Id.* at 230:15–18.

¹⁴ *Id.* at 19:14, 19:24–20:1, 22:8.

1 Though ATMMS services all sorts of businesses, its large casino clients are the focus of
 2 this case.¹⁵ For obvious reasons, casinos want as many ways as possible for their patrons to
 3 access cash¹⁶ or casino chips,¹⁷ so ATMMS's platform offers them a buffet of options: they can
 4 cash checks or dip into their checking or savings accounts with a typical ATM transaction;¹⁸ or,
 5 when their ATM card is maxed out, obtain a cash advance—basically a short-term loan—from
 6 their credit-card company.¹⁹ The industry describes the casino-chip requests as “quasi-cash”
 7 transactions,²⁰ and ATMMS designed MCC with casinos' quasi-cash needs in mind.²¹ Certain
 8 transactions also require cardholders to verify their identity with a personal-identification
 9 number (PIN) or a signature.²²

10 In 2011, years before the EMV transition, ATMMS retained Elavon as its national
 11 processor.²³ In addition to processing services, Elavon also offers hardware like POS
 12 terminals.²⁴ The parties' initial agreement, which did not contemplate the EMV transition,²⁵
 13 allowed ATMMS's customers to process transactions through Elavon's systems without Elavon

15 ¹⁵ *Id.* at 36:22–37:3.

16 ¹⁶ ECF No. 140 at 60:10–14.

17 ¹⁷ ECF No. 136 at 253:18–20.

18 ¹⁸ ECF No. 140 at 58:19–59:6. ATMMS's platform also allows on-site restaurants to accept
 cards for payment. ECF No. 137 at 13–15.

19 ¹⁹ ECF No. 140 at 58:19–59:6, 59:25–60:1. ATMMS also lends its customers the cash to supply
 ATMs (called “vault cash”). ECF No. 136 at 16:3–5, 17:15.

20 ²⁰ ECF No. 136 at 8–13.

21 ²¹ ECF No. 137 at 156:4–18.

22 ²² ECF No. 136 at 16:3–5, 17:15.

23 ²³ *Id.* at 219; ECF No. 140 at 61:15–18.

24 ²⁴ ECF No. 136 at 215:8–216:13.

25 ²⁵ ECF No. 137 at 200:5–8.

1 entering a direct relationship or contract with them.²⁶ Though Elavon appears to have at least
 2 hundreds of clients, Elavon understood the fundamentals of ATMMS's business (that it serviced
 3 casinos) and the importance of quasi-cash and PIN-debit transactions to ATMMS's casino
 4 business.²⁷ And the partnership provided a unique benefit to Elavon because ATMMS offered
 5 products to casinos in ways that Elavon did not²⁸ and ATMMS was Elavon's sole client who
 6 offered quasi-cash services.²⁹

7 Early on in the parties' relationship, Elavon offered ATMMS the choice of how to
 8 connect to Elavon's systems: its platform could speak directly with Elavon's system ("direct
 9 certification") or use Elavon's software (Converge³⁰) as an intermediary.³¹ After longtime
 10 ATMMS employee and general manager Michael Poggi³²—who works with every department in
 11 the company, including the sales, service, and accounting departments³³—learned that the direct

15 ²⁶ ECF No. 136 at 56:20–23, 59:18; ECF No. 137 at 9:3–18, 67:2–6, 152:16–153:12; ECF No.
 16 140 at 167:4–168:6; Trial Exhibit (Tr. Ex.) 72; Tr. Ex. 266.

17 ²⁷ ECF No. 137 at 175:1–23, 189:21–190:23; Deposition of Robert Morris (Morris Dep.), ECF
 18 No. 153 at 18:2–4, 25:15–17, 25:21–25, 45:12–13.

18 ²⁸ ECF No. 137 at 158:17–25, 178:4–6; Morris Dep. at 21:30–22:6.

19 ²⁹ ECF No. 137 at 6:22–24, 92:2–18; *see also* Tr. Ex. 38 (Morris acknowledging that ATMMS is
 20 "specialized" because it offers quasi-cash); Tr. Ex. 41 (Morris reporting that cash-advance
 transactions represent "most of their integration" with 70% being credit and 30% being PIN
 debit); Morris Dep. 26:3.

21 ³⁰ ECF No. 136 at 235:8–16. At that time, it was called "Virtual Merchant." *Id.* at 21:10–15. In
 22 2014, the product was rebranded to "Converge," ECF No. 136 at 216:18–22; ECF No. 137 at
 68:5–6; Tr. Ex. 6, so I use "Converge" throughout for ease of understanding.

23 ³¹ ECF No. 136 at 100:11–101:1, 107:5–21, 109:25–110:7; ECF No. 140 at 140:10, 139:8–19.

³² ECF No. 140 at 155:1.

³³ *Id.* at 56:17–57:25.

1 option came with insurance and other additional requirements,³⁴ ATMMS chose the Converge
2 option at least for its casino clients³⁵ and never again pursued direct certification.³⁶

3 Here's where the story gets really alphabet-soupy. Over the next two years, the parties
4 collaborated on integrating MCC, the POS terminals that ATMMS supplied its customers (more
5 on this later), and Elavon's host through Converge.³⁷ Though ATMMS had primary
6 responsibility for assimilating the systems and communicating with Elavon and other entities like
7 the device manufacturer,³⁸ ATMMS benefitted from guides and codes (collectively, "software-
8 development kits") provided by Elavon and the device manufacturer.³⁹ Development cost
9 ATMMS about \$1 million⁴⁰ and finished in the summer of 2013,⁴¹ providing ATMMS its desired
10 functionalities, including support for quasi-cash and PIN-debit transactions. Once integration
11 was complete, ATMMS transitioned its casino clients to Elavon's services and set them up with
12 POS terminals and MCC, and ATMMS started earning fees.⁴²

13 Throughout the parties' relationship, Poggi acted as the main point of contact from the
14 ATMMS side and provided CEO Carter—who was not directly involved in day-to-day
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16

17 ³⁴ *Id.* at 248:21; ECF No. 140 at 146:5–6; Tr. Ex. 87; Tr. Ex. 97.

18 ³⁵ ECF No. 140 at 62:14–63:13.

19 ³⁶ *Id.* at 146:2–147:8. Some evidence indicates that ATMMS chose the direct-certification
20 option for its non-gaming customers. ECF No. 137 at 216:23–218:25.

21 ³⁷ ECF No. 136 at 216:25–217:16; ECF No. 140 at 148:18–150:9, 162:2–14; Tr. Ex. 91; Tr. Ex.
22 294.

23 ³⁸ ECF No. 140 at 162:2–15, 163:3–24; Tr. Ex. 92; Tr. Ex. 308.

³⁹ ECF No. 136 at 216:25–217:16; ECF No. 140 at 148:18–150:9; Tr. Ex. 294; Tr. Ex. 91.

⁴⁰ ECF No. 140 at 63:21–22.

⁴¹ ECF No. 137 at 39:13–19, 169:12–21, 176:15–177:13; ECF No. 140 at 164:25–165:18.

⁴² ECF No. 136 at 95:6–8; ECF No. 140 at 164:25–165:18, 166:24; Tr. Ex. 266.

1 communications with Elavon⁴³—with weekly updates.⁴⁴ Though Poggi has no formal education
 2 in software development,⁴⁵ 15 people on ATMMS’s technical team supported his day-to-day
 3 work.⁴⁶ Elavon’s outward-facing role for ATMMS, by contrast, changed hands multiple times:
 4 Ryan Hicks served in that role from the start of the relationship in 2011 until sometime before
 5 October 2015;⁴⁷ followed by Robert Morris, who managed the ATMMS relationship until April
 6 2016;⁴⁸ and followed ultimately by Mike Palmer.⁴⁹ These employees, or “relationship
 7 managers” as Elavon refers to them,⁵⁰ acted as conduits between ATMMS and Elavon’s
 8 technical and business teams and regularly updated ATMMS with business insights and the latest
 9 developments in Elavon’s products and services. Despite Elavon’s personnel churn, the parties
 10 “loved” working with each other throughout most of their relationship.⁵¹

11 **III. Elavon pushes the EMV transition and offers the L5200 as its EMV hardware**
 12 **solution for Converge customers.**

13 Starting in 2012, Elavon primed its clients for the impending EMV shift. A December
 14 2012 advertisement sent to Poggi asked “Are you ready” for the transition.⁵² A newsletter from
 15 the next month exclaimed that “Elavon is pleased to announce the launch and support date of our
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17 ⁴³ ECF No. 136 at 50:2–25.

18 ⁴⁴ *Id.* at 37:17–21.

19 ⁴⁵ ECF No. 140 at 155:1.

20 ⁴⁶ *Id.* at 65:10–22.

21 ⁴⁷ *Id.* at 135:10; Morris Dep. at 8:24–9:1.

22 ⁴⁸ ECF No. 136 at 163:16–22; Tr. Ex. 43.

23 ⁴⁹ ECF No. 136 at 163:16–22; Tr. Ex. 43.

⁵⁰ ECF No. 136 at 15–20.

⁵¹ *Id.* at 88:19, 91:13–15; ECF No. 137 at 229:16–230:6; Tr. Ex. 313.

⁵² Tr. Ex. 2

1 new EMV-capable terminal lines” that will be “plug and play”⁵³—essentially meaning that a
 2 user simply plugs in a device or downloads a software, and it works without significant effort on
 3 the user’s part. This piqued Poggi’s interest⁵⁴ because ATMMS or its clients would have to foot
 4 the bill for disputed charges if their equipment and software weren’t EMV compliant by October
 5 1, 2015.⁵⁵

6 So around November 2012, after learning about EMV,⁵⁶ Poggi asked Hicks which POS
 7 device Elavon would support for EMV-compliant transactions through Converge.⁵⁷ Elavon
 8 responded—and Poggi understood⁵⁸—that Elavon’s EMV support for Converge would “not
 9 likely be until” late 2013 and that Elavon was prioritizing its development efforts in Canada,
 10 which had mandated EMV compliance two years prior.⁵⁹ But Elavon ultimately advised
 11 ATMMS that it would support a device called the “L5200” POS terminal to work with
 12 Converge.⁶⁰

13 Based on that information,⁶¹ ATMMS bought 197 L5200s from Elavon sometime in
 14 2013.⁶² Poggi was particularly interested in the L5200 because it would work with Converge
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16 ⁵³ Tr. Ex 3 (cleaned up).

17 ⁵⁴ ECF No. 140 at 65:4–7, 157:3.

18 ⁵⁵ ECF No. 137 at 201:13–16.

19 ⁵⁶ ECF No. 140 at 142:8–10.

20 ⁵⁷ ECF No. 137 at 50:22–56:18; Tr. Ex. 1.

21 ⁵⁸ ECF No. 140 at 153:20–154:11.

22 ⁵⁹ *Id.*; Deposition of Eric Przybylek (Przybylek Dep.), ECF No. 154 at 32:34–33:5, 36:20–37:12,
 23 38:20–39:5.

⁶⁰ ECF No. 136 at 103:22–24, 204:16; ECF No. 137 at 174:13–23; Morris Dep. 11:9–14; Tr. Ex.
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⁶¹ ECF No. 136 at 185:15–22; ECF No. 137 at 171:9–172:10.

⁶² ECF No. 136 at 123:2–19; ECF No. 140 at 179:5–7.

1 and later allow ATMMS’s customers to process EMV-compliant transactions without ATMMS
 2 having to go through the direct-certification process.⁶³ He also believed that the device would be
 3 “plug and play.”⁶⁴ Longtime Elavon employee and executive Lisa Brooks Carmichael—whose
 4 team helped manage Elavon’s relationships with entities like ATMMS⁶⁵—acknowledged that
 5 ATMMS would not have bought the L5200s absent Elavon’s representation that they would be
 6 EMV compliant.⁶⁶

7 For the next two years, Elavon repeatedly touted its EMV technology in messages to its
 8 clients in anticipation of the October 1, 2015, liability-shift date:

- 9 • A February 2013 newsletter about “[n]ew EMV[-][c]apable [t]erminals”
 10 proclaimed that Elavon’s customers “can be confident that Elavon has the
 11 latest . . . solutions to help you succeed.”⁶⁷
- 12 • The next month, Hicks emailed Poggi information about a “[n]ew EMV
 13 [c]apable [p]eripheral for [Converge]” that “will process . . . debit” and “helps
 14 protect your customers from chargebacks and prepares them for the future of
 15 EMV chip cards” because “Elavon wants to ensure you are properly equipped
 16 to position this revolutionary paradigm shift in our [i]ndustry!”⁶⁸ The
 17 newsletter also advertised the L5200 as a “new signature[-]capture device for
 18 use with” Converge that “will process a range of payment types including
 19

20 ⁶³ ECF No. 140 at 157:14–158:9.

21 ⁶⁴ *Id.* at 171:15–19.

22 ⁶⁵ ECF No. 136 at 88:9–19.

23 ⁶⁶ Tr. Ex. 21; ECF No. 137 at 203:6–8, 204:6–8.

⁶⁷ Tr. Ex. 349.

⁶⁸ Tr. Ex. 4

credit [and] debit,” feature a “PIN [p]ad,” and “prepare[] [customers] for the future of EMV chip cards.”⁶⁹ The brochure attached to the newsletter described the L5200 as capable of accepting “PIN-based payment types, including PIN debit.”⁷⁰

- Two days later, Poggi received an ad telling him that the device “[c]an be used in the [Converge] virtual terminal,” and “customers . . . will be able to remotely enable [the device] to support” EMV functionality.⁷¹
- Multiple October 2014 newsletters again hyped Elavon’s “next-generation . . . terminals” to be “shipped **EMV-enabled** for your customers.”⁷²
- A January 2015 newsletter advised customers to “[t]ake advantage of our lower EMV-equipment pricing today, so your customers can be ahead of the October 2015 liability shift.”⁷³

At trial, Carmichael testified that some of the information in these mass communications was not intended for ATMMS. She explained that Elavon categorizes its clients into two classes:⁷⁴ whereas class A clients use devices that Elavon has full control over and directly certify to Elavon’s host,⁷⁵ class B clients like ATMMS use their own software and integrate it

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Tr. Ex. 5.

⁷² ECF No. 136 at 112:19–113:2; Tr. Ex. 8 (emphasis in original); Tr. Ex. 11.

⁷³ Tr. Ex. 14 (cleaned up).

⁷⁴ ECF No. 140 at 4:23–24.

⁷⁵ ECF No. 136 at 229:23–230:5.

1 into Elavon's system either directly or through Converge.⁷⁶ Any messaging suggesting that
 2 EMV functionality would be more or less automatic, Carmichael added, related to class A clients
 3 only.⁷⁷ Though she stated that the messages distinguished between the classes,⁷⁸ she did not
 4 discuss any example emails that explicitly called out the divide, nor did she convincingly
 5 describe how Poggi would know which details didn't apply to ATMMS.⁷⁹ And no written
 6 materials advised that Elavon would not be ready for the EMV transition for class B clients.⁸⁰

7 **IV. ATMMS seeks to enable the L5200 for EMV, and Elavon changes course.**

8 In late 2014, with the EMV shift a year out, Poggi asked Elavon how to enable the L5200
 9 for EMV with Converge.⁸¹ At that point, there was nothing for ATMMS to do in terms of
 10 development, and the ball was in Elavon's court.⁸² Elavon responded that it had not "defined"
 11 steps but was "working on a plan for 2015."⁸³ Two months later, Elavon reported a more precise
 12 timeline: "We anticipate having EMV available for Converge in Q1 or Q2" of 2015.⁸⁴ Poggi

14 _____
 15 ⁷⁶ ECF No. 137 at 38:24–25, 39:13–19, 228:3–18; ECF No. 140 at 4:24–5:10. The class A vs.
 16 class B distinction (whether Elavon controlled the device) is somewhat different than the direct
 17 certification vs. Converge distinction (how a customer integrated into Elavon's system). A class
 18 B customer (with their own device and/or software) could directly certify into Elavon's system.

17 ⁷⁷ ECF No. 136 at 113:6–10; ECF No. 137 at 5:20–25, 194:15–195:6.

18 ⁷⁸ ECF No. 137 at 5:20–25.

19 ⁷⁹ ECF No. 140 at 29:1–9. Carmichael explained that Elavon uses the term Converge to refer to
 20 two distinct things: (1) a virtual terminal used for online payments and (2) the ability to integrate
 21 a client's software with Converge. ECF No. 136 at 116:14–18. ATMMS used the second. No
 22 evidence shows that Elavon explained that distinction to ATMMS or in its client
 23 communications.

21 ⁸⁰ ECF No. 140 at 6:23–7:1, 8:4–8.

22 ⁸¹ Tr. Ex. 12.

23 ⁸² ECF No. 136 at 135:19–121:17.

⁸³ *Id.*

⁸⁴ ECF No. 140 at 76:19; Tr. Ex. 13.

1 took these emails as promises that Elavon would offer an EMV solution for Converge using the
2 L5200s by the liability-shift date.⁸⁵

3 But Elavon's plans changed: it would now support a different device, the Ingenico 250 or
4 iSC250. Though Hicks told Poggi in April 2015 that Elavon's "EMV card reader for Converge
5 will be the Ingenico 250,"⁸⁶ the message went over his head.⁸⁷ The news finally clicked when
6 Poggi saw a May 2015 email informing him that Elavon would switch to a new EMV device by
7 mid-2015.⁸⁸ The email spoke of Elavon's "accelerated migration from non-EMV-capable
8 terminal and pin-pad options over to EMV-enabled solutions."⁸⁹ Under Elavon's plan to switch
9 EMV-supported devices, the L5200s would still be usable but not EMV compliant with
10 Converge;⁹⁰ though some evidence indicates that ATMMS could have achieved EMV
11 compliance by directly certifying the L5200s.⁹¹

12 Faced with Elavon's shifting support, Poggi emailed Elavon within days to shore up
13 ATMMS's ability to be EMV compliant by October: "EMV is very important to me" and "[t]he
14 deadline is October 15th of this year," he said, adding that ATMMS bought the L5200s "with the
15 understanding that they would be made EMV enabled."⁹² He also requested two iSC250s to
16 "integrate them into our platform."⁹³ Elavon shipped the two devices soon thereafter and

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⁸⁵ ECF No. 140 at 174:24; 176:6–8.

18 ⁸⁶ ECF No. 137 at 71:9–20; Tr. Ex. 19.

19 ⁸⁷ ECF No. 140 at 79:14–80:1.

20 ⁸⁸ ECF No. 137 at 174:13–23; Morris Dep. at 16:8; Tr. Ex. 20; Tr. Ex. 29.

21 ⁸⁹ Tr. Ex. 20 (cleaned up).

22 ⁹⁰ Morris Dep. at 14:13–24 (cleaned up).

23 ⁹¹ ECF No. 137 at 107:24–108:13.

⁹² ECF No. 140 at 83:4–5 (Poggi testifying that he was concerned at this point); Tr. Ex. 21; Tr. Ex. 29; Tr. Ex. 24.

⁹³ ECF No. 140 at 83:4–5; Tr. Ex. 21; Tr. Ex. 29.

1 explained that they were part of a test phase and were expected to be EMV enabled by late
2 July.⁹⁴

3 **V. ATMMS enters Elavon’s beta program for an EMV-compliant Converge software.**

4 In response to Poggi’s request for the iSC250 test devices in June 2015, Elavon informed
5 him that it was developing a software-development kit (known in the industry by the shorthand
6 “SDK”) called “Commerce SDK” to help customers like ATMMS connect their software with
7 Converge to process EMV-compliant transactions.⁹⁵ The SDK included both a guide to help
8 with integration and software that resided within the POS terminal’s software.⁹⁶ Elavon’s
9 representative explained that the tool was still being developed but invited ATMMS to join the
10 first beta (or test) phase as an early adopter, and Poggi understood this.⁹⁷ Poggi jumped at the
11 chance and acknowledged that ATMMS would use Commerce SDK “in a test environment . . .
12 until [it is] certified and authorized for release.”⁹⁸

13 As Elavon geared up for the beta program, it continued sending newsletters and direct
14 emails to Poggi about its EMV capabilities ahead of the liability-shift date.⁹⁹ An attachment to a
15 May 2015 email sent specifically to Poggi to gauge ATMMS’s readiness, for example, was
16 captioned “Converge Gets EMV Ready” and stated that the iSC250 has “the ability to accept
17 credit cards and PIN-based transactions” and, though “currently EMV-capable . . . [,] won’t be
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20 ⁹⁴ Tr. Ex. 24; Tr. Ex. 29.

21 ⁹⁵ ECF No. 137 at 88:9–13; Tr. Ex. 29.

22 ⁹⁶ ECF No. 140 at 193:14; Tr. Ex. 96.

23 ⁹⁷ ECF No. 140 at 187:21; Przybylek Dep. at 8:21–22; Tr. Ex. 96.

⁹⁸ Tr. Ex. 96.

⁹⁹ ECF No. 140 at 28:1–18.

1 able to accept a chip card transaction until later in the year after a software download.”¹⁰⁰

2 Another email from that month told Elavon’s customers that, “[t]o make sure we are fully
3 prepared for the EMV-liability shift in October, Elavon is taking every step possible to ensure a
4 smooth transition for our customers,” noting an “accelerated migration” to EMV solutions and
5 the upcoming removal of the option to turn off EMV functionality on terminals.¹⁰¹ Elavon
6 pushed similar messaging in a June newsletter¹⁰² and continuously announced that “EMV is
7 here!” in emails acknowledging the impending October deadline.¹⁰³ A separate June newsletter
8 announced that “some of our EMV[-]capable terminal[s]” would auto-update to EMV enabled
9 starting in July.¹⁰⁴ Some of the messages were sent to Poggi to alleviate his concerns about
10 EMV readiness.¹⁰⁵ In conversations too, Elavon repeatedly sold Commerce SDK as the EMV
11 solution for Converge, specifically for quasi-cash, PIN-debit, and other debit transactions.¹⁰⁶

12 In August, the parties held a call to discuss ATMMS’s “current integration with
13 Converge and see if [Elavon] may move forward with including [ATMMS] in the beta
14 program.”¹⁰⁷ The materials for the call included a presentation describing Commerce SDK as a
15 software tool that “enables a business to implement a secure, pre-certified EMV . . . solution”
16 designed to solve EMV demand in light of the “upcoming liability shift.”¹⁰⁸ ATMMS then
17

18 ¹⁰⁰ Tr. Ex. 25.

19 ¹⁰¹ Tr. Ex. 20 (cleaned up).

20 ¹⁰² Tr. Ex. 26.

21 ¹⁰³ *See, e.g.*, Tr. Ex. 30.

22 ¹⁰⁴ Tr. Ex. 27.

23 ¹⁰⁵ Morris Dep. 26:7–12; 26:14–19.

¹⁰⁶ ECF No. 137 at 223:19–25; Tr. Ex. 32.

¹⁰⁷ Tr. Ex. 95.

¹⁰⁸ Tr. Ex. 96.

1 formally joined the beta program, and Poggi knew that Commerce SDK was in beta and thus not
2 yet a finished product.¹⁰⁹ Throughout this time, ATMMS repeatedly asked about EMV PIN
3 debit,¹¹⁰ and the frequency of those inquiries increased over time.¹¹¹

4 **VI. Elavon fails to support Converge for EMV by the liability-shift deadline.**

5 Facing customer concerns about EMV compliance and a decline in business,¹¹² Poggi
6 sought assurance in writing that Elavon would be ready for the EMV shift, but Elavon declined
7 to author such a letter.¹¹³ On September 25, 2015, Elavon informed Poggi that the Commerce
8 SDK solution would not be ready by the October 1st liability-shift date, acknowledging that
9 Poggi “hope[d] . . . to use Commerce SDK to help with the EMV transitions,” and stating that
10 Elavon did not expect Commerce SDK “to be ready [until] toward the end of 2015.”¹¹⁴ Elavon
11 senior product manager Eric Przybylek—who served in that role from 2015 to 2018 and is no
12 longer with the company¹¹⁵—acknowledged right before the liability-shift date that there were
13 customers like ATMMS “that bought devices that would be EMV enabled like the L5200 and
14 now will not.”¹¹⁶ Poggi testified that this was the first time he understood that Elavon wouldn’t
15 be ready by the EMV-compliance date.¹¹⁷ And Commerce SDK wasn’t EMV ready by that

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18 ¹⁰⁹ ECF No. 140 at 193:2, 187:3–192:4; Tr. Ex. 95.

19 ¹¹⁰ Przybylek Dep. at 43:13, 46:22–23.

20 ¹¹¹ ECF No. 136 at 195:17–19.

21 ¹¹² ECF No. 137 at 204:9–10.

22 ¹¹³ ECF No. 140 at 68:6–10; ECF No. 137 at 209:9–19.

23 ¹¹⁴ Tr. Ex. 31.

¹¹⁵ Przybylek Dep. at 5:22–23, 6:17–21.

¹¹⁶ *Id.*

¹¹⁷ ECF No. 140 at 95:8.

1 date.¹¹⁸ While the iSC250 supported EMV,¹¹⁹ the SDK software could not;¹²⁰ nor was the SDK
2 certified for the iSC250 device.¹²¹

3 From the perspective of Elavon's then employees, the failure to meet the October 1
4 deadline was mostly a non-event. Though ATMMS's EMV compliance was in Elavon's
5 interest,¹²² both Carmichael and Przybylek—who led the beta project¹²³—explained that the
6 timing of Commerce SDK's development was untethered from the EMV liability-shift date.¹²⁴
7 In fact, Przybylek testified that he had no direct role in EMV and that Commerce SDK was part
8 of a broader strategy, not for a specific EMV deadline.¹²⁵ While the product was never striving
9 to be ready for the EMV-compliance deadline,¹²⁶ Elavon did not consciously choose to miss the
10 deadline.¹²⁷ Rather, Elavon road-mapped tentative development dates in collaboration with its
11 technical team and beta-program participants,¹²⁸ and those dates happened to get pushed past the
12 EMV-compliance deadline. In fact, at some point, Elavon knew that ATMMS would not be
13 EMV compliant by the liability-shift date.¹²⁹ Plus, the point of the beta program was to get
14
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16 ¹¹⁸ ECF No. 136 at 111:21–25; ECF No. 137 at 163:8–9; Przybylek Dep. at 24:16–18.

17 ¹¹⁹ Przybylek Dep. at 51:12–13.

18 ¹²⁰ ECF No. 137 at 185:2–3.

19 ¹²¹ *Id.* at 210:17–211:4.

20 ¹²² Morris Dep. at 19:6–16.

21 ¹²³ Przybylek Dep. at 15:14–24.

22 ¹²⁴ *Id.* at 18:10–17.

23 ¹²⁵ *Id.* at 15:14–24.

¹²⁶ *Id.* at 24:5–11.

¹²⁷ ECF No. 140 at 19:10.

¹²⁸ ECF No. 136 at 111:21–25; Przybylek Dep. 6:24–25.

¹²⁹ ECF No. 137 at 168:14–21.

1 feedback from several customers (not just ATMMS¹³⁰)—not to be ready by October 2015.¹³¹

2 And Elavon told ATMMS that PIN-debit functionality would be added later.¹³² Customers who
 3 prioritized EMV compliance by the liability-shift date could have pursued other options,
 4 including direct certification, rather than wait for Commerce SDK,¹³³ and Elavon orally told
 5 ATMMS about those options multiple times, including in 2015.¹³⁴ Though Elavon designed
 6 Commerce SDK to help connect its clients' platforms to Elavon's systems with Converge to
 7 support EMV, it had no responsibility to develop such a tool.¹³⁵

8 The rub: no documentary evidence shows that Elavon told ATMMS that Commerce SDK
 9 might not be viable by October 2015.¹³⁶ There's also no written evidence that Elavon offered
 10 the direct-certification option anytime between 2012 and 2015 after the parties had the initial
 11 discussion about which approach ATMMS would take.¹³⁷ And Carmichael conceded that
 12 ATMMS didn't do anything contrary to Elavon's instructions.¹³⁸

13 But ATMMS never asked about or pursued alternatives to Commerce SDK like direct
 14 certification after 2012.¹³⁹ And it appears that ATMMS could have largely achieved its EMV
 15

16 ¹³⁰ Przybylek Dep. at 9:16–20; 42:18–43:2.

17 ¹³¹ *Id.* at 22:24–23:8.

18 ¹³² *Id.* at 43:13, 46:22–23, 27:5–29:4 (explaining that at some point between August 2015 and
 19 March 2016 ATMMS asked if it would support PIN debit but that Elavon was up front that it
 would not).

20 ¹³³ *Id.* at 24:5–11.

21 ¹³⁴ ECF No. 137 at 92:17–93:4, 111:13–18; Przybylek Dep. at 45:13–22.

22 ¹³⁵ ECF No. 140 at 54:17–20.

23 ¹³⁶ ECF No. 136 at 117:11; ECF No. 137 at 181:16–19.

¹³⁷ ECF No. 137 at 112:4–11, 170:8–11; ECF No. 140 at 38:2.

¹³⁸ ECF No. 137 at 179:4–9.

¹³⁹ ECF No. 140 at 187:3–192:4.

goals by the liability-shift date if it had;¹⁴⁰ it could have written its own code to integrate MCC into Converge¹⁴¹ or directly certified its platform to Elavon's system¹⁴² using the L5200s that ATMMS's clients had.¹⁴³ Poggi testified that, though he didn't know he could have achieved EMV compliance with these alternatives, ATMMS would have (and could have¹⁴⁴) pursued them if he knew.¹⁴⁵ However, some evidence indicates that no Elavon option would have supported EMV PIN-debit transactions specifically by the liability-shift date.¹⁴⁶

ATMMS reacted differently to the lack of EMV support by the liability-shift date. Poggi testified that he believed that Elavon's representations starting in 2012 meant that Commerce SDK and the L5200 terminal (and then the iSC250)¹⁴⁷ would deliver EMV functionality by October 2015.¹⁴⁸ He thought that Elavon's technology would support the same functionalities that Elavon offered through Converge before the EMV transition, including support for EMV PIN-debit transactions.¹⁴⁹ According to Poggi, ATMMS would have found an alternative if Elavon had not agreed to this.¹⁵⁰ Nonetheless, he conceded that Elavon wasn't entirely responsible for ATMMS's EMV compliance; ATMMS had to choose its approach to EMV

¹⁴⁰ ECF No. 137 at 227:18–20.

¹⁴¹ ECF No. 140 at 21:10–14.

¹⁴² ECF No. 136 at 102:19–22; ECF No. 140 at 52:1–53:14.

¹⁴³ ECF No. 137 at 107:24–108:13.

¹⁴⁴ ECF No. 140 at 217:11; Tr. Ex. 25 (noting that ATMMS qualified for direct certification).

¹⁴⁵ ECF No. 140 at 197:22–25, 200:18–21, 203:17.

¹⁴⁶ Przybylek Dep. at 40:6–13, 56:16–18. Przybylek did not appear certain about the details surrounding EMV, as that was not his focus, and referred to Carmichael for specifics.

¹⁴⁷ ECF No. 140 at 66:19–67:4.

¹⁴⁸ *Id.* at 65:23–66:7.

¹⁴⁹ ECF No. 140 at 76:24–77:14, 173:11–15.

¹⁵⁰ *Id.* at 66:13–18.

1 compliance¹⁵¹ and develop some coding of its own.¹⁵² Poggi also testified that he believed
 2 Elavon’s representations were “partially true” or “could be true,”¹⁵³ implying that he understood
 3 that Elavon might not live up to every detail of its messaging.

4 **VII. Elavon declines to cover ATMMS’s potential liability while Commerce SDK is**
 5 **finalized.**

6 Once ATMMS learned that Commerce SDK would not be EMV ready by October 2015,
 7 Poggi asked how Elavon planned to handle “liability coverage for those customers that bought
 8 devices that would be EMV enabled like the L5200 and now will not.”¹⁵⁴ Elavon understood
 9 that Poggi was concerned about his clients and ATMMS’s liability.¹⁵⁵ Elavon was considering
 10 discounting swaps from the unsupported L5200s to the supported iSC250s and providing
 11 amnesty to—that is, cover the fraudulent-charge liability for¹⁵⁶—clients with L5200s.¹⁵⁷ Elavon
 12 was focused on ATMMS because it had requested information, it was the most impacted, and its
 13 clients were asking for a temporary fix until it had an EMV solution.¹⁵⁸ Poggi also expressed
 14 concern because ATMMS “put all of our eggs into one basket” with Elavon and asked about
 15 EMV compliance on a regular basis.¹⁵⁹

18 ¹⁵¹ ECF No. 140 at 169:14–170:2, 195:13.

19 ¹⁵² *Id.* at 187:3–192:4.

20 ¹⁵³ *Id.* at 87:10–15.

21 ¹⁵⁴ Tr. Ex. 31.

22 ¹⁵⁵ Morris Dep. 39:15–40:13.

23 ¹⁵⁶ ECF No. 137 at 105:5–7.

¹⁵⁷ Tr. Ex. 98.

¹⁵⁸ *Id.*; Morris Dep. at 42:20–23.

¹⁵⁹ Tr. Ex. 98.

1 Realizing that Elavon would likely decide against giving ATMMS amnesty because of
 2 the volume of disputed charges on quasi-cash transactions,¹⁶⁰ Carmichael’s team pressed for
 3 amnesty to appease ATMMS as a “relationship-management” strategy.¹⁶¹ Indeed, her team
 4 wanted to keep ATMMS as a partner.¹⁶² Morris requested it as an advocate for his client,¹⁶³ and
 5 he thought that ATMMS deserved it because Elavon went in a different direction.¹⁶⁴ Plus his
 6 compensation was tied to his client’s performance so he had a personal interest in amnesty.¹⁶⁵
 7 So the relationship-management team proposed amnesty “until Elavon is in a position to provide
 8 replacement hardware for the L5200s that [ATMMS] was initially instructed to provide.”¹⁶⁶
 9 They reasoned that ATMMS spent \$100,000 “in order to move in[] the direction of EMV” and
 10 then “Elavon changed direction and decided we weren’t going to offer the L5200.”¹⁶⁷

11 As Carmichael’s team predicted, Elavon’s higher-ups ultimately declined amnesty for
 12 ATMMS because ATMMS wasn’t bringing in enough new business to justify the risk.¹⁶⁸ In an
 13 email, Morris explained the decision, stressing that his team “pushed all the way to the top” to
 14 secure amnesty for ATMMS “while your EMV quasi-cash solution is developed.”¹⁶⁹ He also
 15 suggested that ATMMS instead cover its customers’ liability and “create a communication . . .

17 ¹⁶⁰ *Id.*

18 ¹⁶¹ ECF No. 136 at 135:25–136:2, 137:20–22; Tr. Ex. 32.

19 ¹⁶² ECF No. 137 at 17–25.

20 ¹⁶³ Morris Dep. at 29:10–14.

21 ¹⁶⁴ *Id.* at 30:22–31:1.

22 ¹⁶⁵ *Id.* at 42:19–24.

23 ¹⁶⁶ Tr. Ex. 101.

¹⁶⁷ *Id.*

¹⁶⁸ ECF No. 137 at 107:2–6, 196:9–15; ECF No. 140 at 44:8–11.

¹⁶⁹ Tr. Ex. 32.

1 explaining the November/December timeframe that is expected currently for development work
 2 to be completed.”¹⁷⁰ This news put Poggi “in a bit of a panic mode” in search of a technical
 3 solution to become compliant.¹⁷¹ Poggi told Elavon that, because they wouldn’t send an amnesty
 4 letter, they couldn’t get new business,¹⁷² and Elavon could see the harm to ATMMS’s business
 5 because it had access to the reports of transaction-processing volume.¹⁷³ Morris later reminded
 6 Poggi that Elavon would “work[] with you to cover the cost of the replacement equipment.”¹⁷⁴

7 **VIII. Elavon launches Commerce SDK and discounts the iSC250s.**

8 Elavon continued development of Commerce SDK after the liability-shift date.¹⁷⁵ In
 9 January 2016, Poggi told Przybylek that one of ATMMS’s “[c]asino [l]ocations cancel[led] their
 10 contract . . . due to EMV non-compliance,” and he asked for an updated completion date.¹⁷⁶
 11 “We are targeting the end of February,” Przybylek responded, “but there are some risks that may
 12 push [us] into early March.”¹⁷⁷ Poggi understood that these dates were development targets.¹⁷⁸
 13 Despite repeated inquiries by Poggi,¹⁷⁹ early March then turned into a “march[] to a general
 14 release at” the end of the month,¹⁸⁰ which transformed again into “an April launch.”¹⁸¹ During

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 16 ¹⁷⁰ *Id.*

17 ¹⁷¹ Tr. Ex. 105.

18 ¹⁷² ECF No. 140 at 39:17–20.

19 ¹⁷³ Morris Dep. at 39:9–14.

20 ¹⁷⁴ Tr. Ex. 32.

21 ¹⁷⁵ ECF No. 139 at 141:15–19; Tr. Ex. 33.

22 ¹⁷⁶ Tr. Ex. 34; Tr. Ex. 114.

23 ¹⁷⁷ Tr. Ex. 34.

¹⁷⁸ ECF No. 140 at 207:2–18.

¹⁷⁹ *See, e.g.*, Tr. Ex. 132.

¹⁸⁰ Tr. Ex. 35.

¹⁸¹ Tr. Ex 37; Tr. Ex. 40.

1 this time, Elavon internally acknowledged that ATMMS was losing business each day without an
 2 EMV solution, but some of the delay was due to third parties that had nothing to do with
 3 Elavon.¹⁸² Nevertheless, Poggi understood that Elavon had to finish development before
 4 ATMMS could use Commerce SDK; the license agreement was not ready; and ATMMS still
 5 needed to integrate Commerce SDK to MCC and certify the integration into Converge.¹⁸³

6 Ahead of the launch, in March 2016, the parties entered into a licensing agreement
 7 allowing ATMMS to use Commerce SDK beyond the testing phase.¹⁸⁴ In an email discussing
 8 that agreement, Przybylek acknowledged Poggi’s “need for” an EMV solution.¹⁸⁵ The
 9 agreement specifies that one purpose of the software was to “assist a merchant in implementing a
 10 pre-certified EMV . . . payment solution.”¹⁸⁶ It includes a clause merging “all prior or
 11 contemporaneous proposals, negotiations, conversations, discussions[], and agreements . . .
 12 whether oral or written, with respect to the subject matter” of the agreement and stating that the
 13 parties didn’t rely “on any prior statements of representations.”¹⁸⁷ Under the agreement, Elavon
 14 also disclaims liability “for any damages . . . related to or arising out of [ATMMS’s] use of, or
 15 the inability to use. . . Commerce SDK.”¹⁸⁸

19 ¹⁸² ECF No. 136 at 153:20–155:24; ECF No. 140 at 211:1–24; Tr. Ex. 42; Tr. Ex. 44; Tr. Ex.
 141.

20 ¹⁸³ ECF No. 137 at 213:15–19; ECF No. 140 at 208:17–209:22; Tr. Ex. 160.

21 ¹⁸⁴ Tr. Ex. 39.

22 ¹⁸⁵ Tr. Ex. 38.

¹⁸⁶ Tr. Ex. 39 at PLTF000124.

23 ¹⁸⁷ *Id.* at PLTF000130.

¹⁸⁸ *Id.* at PLTF000127.

1 When Commerce SDK launched in April 2016, Elavon advertised it as a tool that would
 2 allow its clients “to integrate with Elavon and be completely EMV compliant as a result.”¹⁸⁹
 3 Though ATMMS had access to the Commerce SDK in April, it was only certified to deploy it in
 4 June,¹⁹⁰ as the parties’ technical teams were working out kinks to get the various hardware and
 5 software components integrated.¹⁹¹ By June, ATMMS started onboarding its first customers to
 6 the EMV Commerce SDK solution.¹⁹² By that point, Commerce SDK allowed for some EMV
 7 functionalities but did not support others, including PIN-debit transactions.¹⁹³ Przybylek
 8 testified that he had told Poggi in late 2015 that Commerce SDK would not initially support PIN
 9 debit.¹⁹⁴

10 In conjunction with the general release of Commerce SDK around mid-2016, Elavon
 11 swapped the L5200s that ATMMS had in the field for iSC250s at a discounted price, depending
 12 on how long each L5200 had already been used, with older ones less discounted.¹⁹⁵ ATMMS
 13 bought 117 iSC250s—well below the number of L5200s it previously purchased, Poggi asserted,
 14 because ATMMS lost some locations due to its lack of EMV functionality.¹⁹⁶ Elavon did not
 15 pay for costs associated with the installation of the iSC250s.¹⁹⁷

18 ¹⁸⁹ *Id.*

19 ¹⁹⁰ ECF No. 140 at 127:2–8.

20 ¹⁹¹ Tr. Ex. 45.

21 ¹⁹² Tr. Ex. 186.

22 ¹⁹³ ECF No. 140 at 137:2–8; Tr. Ex. 132.

23 ¹⁹⁴ Przybylek Dep. at 36:1–15.

¹⁹⁵ *Id.* at 107:17–23; Tr. Ex. 164.

¹⁹⁶ ECF No. 140 at 67:12–23.

¹⁹⁷ ECF No. 136 at 153:20–155:24.

1 **IX. Elavon adds functionality but not PIN-debit support to Commerce SDK and ends**
2 **the relationship.**

3 Around the time of the Commerce SDK deployment in late June 2016, Poggi asked
4 Morris when PIN-debit functionality would be supported, recognizing that Elavon had targeted
5 the end of June.¹⁹⁸ “July 27,” Morris answered.¹⁹⁹ In early July, Poggi confirmed that ATMMS
6 had 30 terminals using Commerce SDK in the field and commented that Elavon “did a great job
7 on the EMV product,” as ATMMS “had no service calls.”²⁰⁰ The parties continued to address
8 technical issues and new features that year, but not PIN debit.²⁰¹

9 In January 2017, still without PIN-debit functionality, Poggi laid out his complaints in a
10 letter to Elavon requesting a meeting to discuss “product[-]completion dates and revenue”:
11 ATMMS “pursu[ed] the EMV product almost two years” before the liability-shift date; it
12 “purchased the product that [he] was told to purchase;” he “constantly asked about processing of
13 EMV transactions”; and Elavon “bombarded” him “with EMV notifications . . . leading [him] to
14 believe that Elavon was going to be ready to process EMV transactions” by the liability-shift
15 date.²⁰² Despite all that, Poggi continued, Elavon told him that ATMMS would not be able to
16 process EMV transactions a mere month before the liability-shift date; ATMMS was liable for
17 fraudulent charges; “12 high[-]volume locations either broke their contracts or chose not to
18 renew due to [ATMMS’s] inability to process EMV transactions”; it “cannot acquire new
19 locations for [c]redit[-][c]ard [c]ash [a]dvance;” ATMMS laid off four salespeople and had lost

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21 ¹⁹⁸ Tr. Ex. 186.

22 ¹⁹⁹ *Id.*

23 ²⁰⁰ Tr. Ex. 188.

²⁰¹ Tr. Ex. 193; Tr. Ex. 203.

²⁰² Tr. Ex. 48.

1 \$900,000 and growing; and its reputation for quasi-cash was “reduced to almost nothing.”²⁰³

2 Poggi also included a timeline of events from ATMMS’s perspective.²⁰⁴

3 The parties met to discuss these concerns in April 2017. After the meeting, Poggi
4 circulated a summary recounting his understanding of the discussion, including that Elavon is
5 prioritizing work in Canada over additional functionalities for Commerce SDK, such as quasi-
6 cash and PIN-debit transactions, and that completion dates would be a guess.²⁰⁵ No one at the
7 meeting advised ATMMS to pursue direct certification.²⁰⁶ Elavon never provided feedback on
8 Poggi’s complaint letter saying that anything was inaccurate.²⁰⁷

9 As the year progressed, Elavon continued pushing its target date for PIN-debit
10 functionality.²⁰⁸ In September 2017, Poggi asked Elavon about its timeline for that technology,
11 noting that he understood that Canada took priority and that the Canada work was expected to be
12 complete a month prior.²⁰⁹ Elavon pushed back the date again and again, and Carmichael
13 conceded that Elavon failed to meet any of the target dates.²¹⁰

14 Elavon cancelled its agreement with ATMMS in 2019 without providing a reason and
15 before Commerce SDK ever supported PIN-debit transactions,²¹¹ and the parties have no
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18 ²⁰³ *Id.*

19 ²⁰⁴ *Id.*

20 ²⁰⁵ Tr. Ex. 48 at PLTF000171.

21 ²⁰⁶ ECF No. 140 at 128:16–19.

22 ²⁰⁷ *Id.* at 119:21–23.

23 ²⁰⁸ Przybylek Dep. at 57:13–23, 58:14–16.

²⁰⁹ Tr. Ex. 240.

²¹⁰ ECF No. 136 at 195:12.

²¹¹ ECF No. 136 at 32:13–25.

1 relationship now.²¹² None of the casinos that ended their relationship with ATMMS became
2 direct customers of Elavon.²¹³ According to Poggi, at no point did Elavon advise him to pursue
3 direct certification, and if it had, ATMMS would have done so,²¹⁴ and Przybylek testified that he
4 doesn't know if Elavon spoke with ATMMS specifically about fact that it could have accessed
5 PIN-debit support through direct certification.²¹⁵

6 **X. ATMMS sues Elavon.**

7 ATMMS sued Elavon in 2018, asserting various claims, six of which survived to trial:
8 fraud, negligent misrepresentation, breach of contract, bad faith, intentional interference with
9 contractual relations, and intentional interference with prospective business relations.²¹⁶

10 ATMMS alleges that Elavon negligently and intentionally represented that it would—and
11 entered into an oral agreement with ATMMS to—be ready for the EMV standard by the liability-
12 shift date; failed to deliver contrary to its representations, the oral contract, and the covenant of
13 good faith and fair dealing implied in that contract; and, in so doing, intentionally interfered with
14 ATMMS's existing and potential contracts with customers. ATMMS asserts these claims based
15 on three factual theories: (1) ATMMS failed to support any EMV-compliant transactions through
16 Converge by the liability-shift date; (2) it failed to support certain transaction types like EMV
17 PIN debit well past that date; and (3) it failed to support the L5200 payment terminal as Elavon's
18 EMV-compliant POS device.

21 ²¹² ECF No. 140 at 60:16–18.

22 ²¹³ ECF No. 136 at 70:12.

23 ²¹⁴ ECF No. 127:17–22.

²¹⁵ Przybylek Dep. at 96:6–10.

²¹⁶ ECF No. 39.

1 Following remand from the Ninth Circuit at the summary-judgment phase,²¹⁷ the parties
 2 proceeded to a three-day bench trial in December 2022. The court heard live testimony from
 3 Carter, Carmichael, and Poggi, along with the deposition testimony of Morris and Przybylek.²¹⁸

4 At trial, CEO Carter testified that ATMMS lost many of its larger casino clients because
 5 it was not ready for EMV in time.²¹⁹ Carter blamed that failure for the significant downturn in
 6 ATMMS's business, including its transaction-processing volume falling from \$5 million per
 7 month in early 2015 to a tenth of that now; reducing its former profits of \$2 million per month;
 8 losing the ability to develop the company, buy more equipment, make deals, and hire employees;
 9 and downsizing its workforce from 30 people to 15.²²⁰

10 One exhibit at trial was a spreadsheet of ATMMS's transaction volume during its
 11 relationship with Elavon between 2013 and 2018.²²¹ This spreadsheet includes columns for each
 12 month (and year) between 2013 and 2018, listing the number of merchants (Count); active
 13 merchants, i.e., those that processed transactions (Active Mid Count); the total amount in
 14 transactions ATMMS processed through Elavon (Net Volume); the number of transactions (No
 15 Tckts); and the amount of money Elavon paid ATMMS in residuals (\$ MSP).²²² Net volume
 16 climbed until 2015, peaking at \$4,159,268 in March 2015; more or less steadily dropped until it
 17 reached just under \$3,000,000 in August of that year; plummeted by about \$750,000 in both

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 19 ²¹⁷ ECF No. 108, Ninth Cir. Case No. 20-15271.

20 ²¹⁸ The deposition testimony was submitted along with the parties' objections to various portions
 21 of that testimony. Because my findings and conclusions are not dependent on any of the
 22 objected-to testimony, I do not rule on those objections.

23 ²¹⁹ ECF No. 136 at 39:18, 20, 40:15–16.

²²⁰ *Id.* at 42:8–9.

²²¹ ECF No. 137 at 141:17–145:6; Tr. Ex. 280.

²²² ECF No. 137 at 141:17–145:6.

1 September and October to a low of \$1,473,067; and then rebounded to around \$1,750,000 in
 2 November, where it stayed (plus or minus a few hundred thousand) for the remainder of the
 3 relationship.²²³ The number of active merchants grew from two at the beginning to 118 in
 4 October 2015 and dropped in December to around 100, where it stayed.

5 This exhibit reflects only residuals, but Poggi testified that there were other damages. He
 6 said that ATMMS lost 7% on credit-card cash advances paid by the cardholder.²²⁴ These fees
 7 are based on contracts not in evidence.²²⁵ Poggi calculated the damages up to 2018 at
 8 \$5,807,635.74.²²⁶ Going forward, Poggi pegged the damages at \$187,401.89 per month, which
 9 sums the \$129,332.80 estimate for quasi-cash losses and \$67,069 for other financial products.²²⁷
 10 Poggi also testified that ATMMS's business was growing into 2015 and then lost new and
 11 existing business because ATMMS couldn't verify that it would be EMV compliant by the
 12 liability-shift date.²²⁸ He averred broadly that ATMMS had to reduce its workforce and that its
 13 reputation was harmed because competitors were EMV compliant.²²⁹

19 ²²³ The \$174,135 number for December 2016 appears to be anomalous, but the parties failed to
 explain it.

20 ²²⁴ ECF No. 140 at 221:10–222:18.

21 ²²⁵ *Id.* at 224:25–225:3.

22 ²²⁶ *Id.* at 112:1–3, 123:24.

²²⁷ *Id.* at 124:3–126:19.

23 ²²⁸ *Id.* at 129:21–130:7

²²⁹ *Id.* at 130:18–22.

Conclusions of Law

I. ATMMS proved that Elavon negligently misrepresented that it would offer an EMV-compliant Converge solution by the liability-shift date, but it failed to prove any of its other claims.

A. Elavon negligently—though not intentionally—misrepresented that ATMMS would be able to process EMV-compliant transactions by October 2015.

ATMMS asserts claims of fraud and negligent misrepresentation. To establish its fraud claim under Nevada law, ATMMS must prove the following elements by clear and convincing evidence: (1) Elavon made a false representation; (2) Elavon knew or believed that the representation was false or had an insufficient basis for asserting it; (3) Elavon intended to induce ATMMS to act or refrain from acting in reliance on the misrepresentation; (4) ATMMS justifiably relied on the misrepresentation; and (5) that reliance harmed ATMMS.²³⁰ A negligent-misrepresentation claim also requires proof by clear and clear evidence of the first (false representation), fourth (justifiable reliance), and fifth (resulting harm) of these elements, plus a finding that Elavon “fail[ed] to exercise reasonable care or competence in . . . communicating” the representation.²³¹ The clear-and-convincing-evidence standard does not require certainty, but the evidence must “persuade[] [the factfinder] that the truth of the contentions is highly likely” and elicit a “firm belief or conviction as to the allegations.”²³²

²³⁰ *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992).

²³¹ *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1153 (Nev. 2013), *as corrected* (Aug. 14, 2013) (quoting Second Restatement of Torts).

²³² Nev. Civ. Jury Instruction 2.2.

1 1. *Elavon falsely represented that it would support EMV-compliant*
 2 *transactions through Converge by the liability-shift date for customers*
 3 *like ATMMS.*

4 ATMMS met the first element of its fraud claim. Though I find the record ambiguous as
 5 to whether Elavon made the verbal representation that Converge would be EMV ready by
 6 October 2015, the documentary evidence strongly supports that Elavon made it in writing.
 7 Indeed, for years leading up to the liability-shift date, Elavon barraged Poggi with messages
 8 implying that an EMV-ready solution was on the way. Several emails variously described the
 9 launch of “plug and play” EMV “terminal lines”²³³; EMV-capable devices for Converge to
 10 prepare customers “for the future of EMV chip cards” because “Elavon wants to ensure you are
 11 properly equipped to position this revolutionary paradigm shift in our [i]ndustry!”;²³⁴ the ability
 12 to “remotely enable” devices to support EMV functionality;²³⁵ “next-generation . . . terminals”
 13 that would “be shipped **EMV-enabled** for your customers;”²³⁶ “lower EMV[-]equipment pricing
 14 . . . so your customers can be ahead of the October 2015 liability shift;”²³⁷ that “[t]o make sure
 15 we are fully prepared for the EMV liability shift in October, Elavon is taking every step possible
 16 to ensure a smooth transition for our customers” and “we are beginning our accelerated
 17 migration from non-EMV capable terminal and pin pad options to EMV enabled solutions;”²³⁸
 18 and a software download to allow “customers to start accepting EMV transactions.”²³⁹

19 _____
 20 ²³³ Tr. Ex. 3.

21 ²³⁴ Tr. Ex. 4

22 ²³⁵ Tr. Ex. 5.

23 ²³⁶ Tr. Ex. 8 (emphasis in original); Tr. Ex. 11.

²³⁷ Tr. Ex. 14.

²³⁸ Tr. Ex. 20; Tr. Ex. 26.

²³⁹ Tr. Ex. 25.

1 To be sure, mass advertisements alone might not constitute an assertion that Elavon
 2 would offer ATMMS the EMV tools that it specifically needed by the EMV-compliance
 3 deadline. But Poggi repeatedly asked his assigned contacts at Elavon about EMV readiness for
 4 Converge, and Elavon responded that it planned for or expected a solution by various dates in
 5 2015.²⁴⁰ Elavon sent these messages understanding the importance of EMV compliance, the
 6 consequences of non-compliance by October 2015,²⁴¹ that ATMMS connected to Elavon's
 7 system through Converge, and ATMMS's reasons for doing so.²⁴² It also was on notice that
 8 ATMMS bought the L5200s and entered the Commerce SDK beta program in anticipation of the
 9 EMV transition.²⁴³ And Elavon's technology supported ATMMS's integration to Converge
 10 prior to the EMV transition.²⁴⁴ So, viewing the totality of the written communications in that
 11 context, I find that Elavon represented that it would offer both equipment and software for
 12 ATMMS to process EMV-compliant transactions through Converge by the liability-shift date.

13 Elavon's attempts to run from its own communications fail. Though Carmichael testified
 14 that some of the EMV-related newsletters applied only to class A clients and not ATMMS,²⁴⁵ the
 15 emails didn't make that distinction clear. That defense also ignores the individualized responses
 16 to Poggi's questions about the timeline for EMV for Converge.²⁴⁶ Also, that ATMMS may be a
 17 sophisticated industry player and Poggi understood that ATMMS had to program some code on

19 ²⁴⁰ See, e.g., Tr. Ex. 12 (noting that Elavon was "formulating a plan for 2015"); Ex 13 (Elavon
 20 "anticipated having EMV available for Converge in Q1 or Q2" of 2015).

21 ²⁴¹ ECF No. 136 at 95:19–99:3.

22 ²⁴² *Id.* at 100:11–101:1.

23 ²⁴³ Morris Dep. at 11:9–14; Tr. Ex. 12.

²⁴⁴ ECF No. 137 at 176:15–177:13.

²⁴⁵ ECF No. 140 at 5:20–25.

²⁴⁶ Tr. Ex. 12.

1 its own²⁴⁷ is of no moment: though ATMMS had some responsibility for integrating its software
 2 into Converge even with Commerce SDK, Elavon represented that it would be possible for
 3 ATMMS to do that. And Elavon's telling ATMMS before the liability-shift date that it wouldn't
 4 meet the deadline²⁴⁸ shows that it was at least aware of ATMMS's goal of being compliant by
 5 that date.

6 Yet the representation that Elavon would provide the tools ATMMS needed to integrate
 7 MCC into Converge by October 2015 was false, and Elavon knew it. Przybylek testified that
 8 Elavon never intended to achieve the solution ATMMS sought by the liability-shift date. Also,
 9 the evidence shows that Elavon likely lacked a sufficient basis to continuously tout its EMV
 10 technology for Converge-reliant customers, as it did not even begin its beta program for
 11 Commerce SDK until well into 2015. So the first and second elements of the fraud and
 12 negligent-misrepresentation claims are satisfied.

13
 14 **2. *ATMMS justifiably relied on Elavon's misrepresentations to its detriment.***

15 ATMMS also met the last two elements of its fraud claim (justifiable reliance and harm).
 16 The justifiable-reliance requirement "does not impose a duty to investigate absent any facts to
 17 alert the defrauded party his reliance is unreasonable."²⁴⁹ Rather, a "party has a right to rely on
 18 an express statement of existing fact, the truth of which is known to the party making the
 19 representation and unknown to the other party."²⁵⁰ However, a person may not rely on a
 20

21 _____
 22 ²⁴⁷ ECF No. 149 at 6.

23 ²⁴⁸ Tr. Ex. 31.

²⁴⁹ *Collins v. Burns*, 741 P.2d 819, 821 (Nev. 1987).

²⁵⁰ *Id.*

1 representation if he “has information [that] would serve as a danger signal and a red light to any
2 normal person of his intelligence and experience.”²⁵¹

3 Applying these principles, ATMMS’s reliance on Elavon’s representations about its
4 EMV technology was justified. Poggi credibly testified that ATMMS would have hired a
5 different processor or developed its own software if he knew that Elavon would not deliver on its
6 assertions.²⁵² That testimony comports with emails from Poggi during the relevant time period
7 that ATMMS depended on an Elavon solution for EMV compliance.²⁵³ The parties had a good
8 working relationship²⁵⁴ and together already integrated MCC to Elavon’s system once before.²⁵⁵
9 Elavon understood the importance of EMV compliance to the industry and ATMMS
10 specifically,²⁵⁶ and I find that it never told ATMMS that Commerce SDK would not be a viable
11 option by the liability-shift date.²⁵⁷ By contrast, a long parade of emails touted Elavon’s EMV
12 readiness and made no distinctions by types of customers.²⁵⁸ So I find that ATMMS was entitled
13 to put faith in Elavon’s representations.

14 That faith caused ATMMS harm. Carter’s testimony revealed that casino customers fled
15 ATMMS once they found out that it would not be EMV compliant.²⁵⁹ Common sense supports
16 that notion—why wouldn’t a large business switch to an ATM services provider that provided
17

18 ²⁵¹ *Id.*

19 ²⁵² ECF No. 140 at 197:22–25, 200:18–21, 203:17.

20 ²⁵³ Tr. Ex. 98.

21 ²⁵⁴ ECF No. 137 at 229:16–230:6.

22 ²⁵⁵ ECF No. 140 at 146:2–147:8.

23 ²⁵⁶ ECF No. 136 at 95:19–99:3.

²⁵⁷ ECF No. 140 at 6:23–7:1, 8:4–8.

²⁵⁸ *See, e.g.*, Tr. Ex. 3; Tr. Ex. 4; Tr. Ex. 5.

²⁵⁹ ECF No. 136 at 39:18, 20, 40:15–16.

1 technology that helped shield it from chargeback liability? Elavon's business records also show
 2 a decline in ATMMS's processing volume and the residuals it received around the liability-shift
 3 date.²⁶⁰ That fact supports the inference that ATMMS's harm was caused by its failure to be
 4 EMV compliant for customers like ATMMS by the liability-shift date. So ATMMS established
 5 the reliance and harm elements of their fraud and negligent-misrepresentation claims.²⁶¹

6 Elavon's contentions to the contrary lack merit. It first tries to shift the blame onto
 7 ATMMS because it pursued Converge rather than shift to a direct-integration approach.²⁶² But
 8 ATMMS had no obligation to take an alternative path in the face of representations that ATMMS
 9 would have an EMV-compliant Converge product ready by the liability-shift date. Plus, shifting
 10 gears would have required ATMMS to expend additional resources and comply with additional
 11 requirements, and it's unclear to the court whether direct integration would even support MCC.

12 Elavon next argues that any reliance on moving target dates was unreasonable.²⁶³ True
 13 enough, an ordinary person would not rely on explicitly tentative dates. But the
 14 misrepresentations on which I find that ATMMS reasonably relied are not each and every
 15 provisional goal before the liability-shift date but rather the totality of the messages that implied
 16 that Elavon would provide an EMV solution by that date. Those representations were false, as
 17 Elavon knew it wouldn't deliver by October 2015 and put compliance for ATMMS on the
 18 backburner for several years in favor of a focus on products for Canada.²⁶⁴

20 ²⁶⁰ Tr. Ex. 280.

21 ²⁶¹ Of course, *harm* must not be conflated with *amount of compensatory damages*. While
 22 ATMMS has proven harm, it has not tied that harm to a reasonably accurate dollar amount. *See*
 23 *infra* at pp. 44–48.

²⁶² ECF No. 149 at 33.

²⁶³ *Id.* at 34.

²⁶⁴ Przybylek Dep. at 36:20–37:12.

3. ***Because the evidence shows that Elavon acted negligently but not intentionally, ATMMS is entitled to judgment in its favor on its negligent-misrepresentation claim but not its fraud claim.***

ATMMS proved that Elavon acted unreasonably in communicating the misrepresentations. I find that a reasonable actor in Elavon’s situation would have tamed its communications by distinguishing between customers like ATMMS and those directly certifying or adding caveats about its EMV readiness. When Poggi expressed the importance of EMV compliance by the deadline, Elavon could have advised ATMMS that direct certification was the only path to that solution. But it did not, and no documentary evidence shows that it even pushed back on Poggi’s expectation. Also, that Elavon employees lobbied so hard for amnesty and discounted the iSC250s²⁶⁵ suggests that they knew that Elavon should have done more for its customer. And some evidence indicates that Elavon was experiencing a right-hand–left-hand problem as its relationship managers weren’t coordinating with its other teams in communicating with ATMMS about EMV compliance.²⁶⁶ So I find that Elavon “fail[ed] to exercise reasonable care or competence in . . . communicating” the representations to ATMMS.

But ATMMS has not shown that Elavon “intended to induce ATMMS to act or refrain from acting in reliance on the misrepresentation,” especially by clear and convincing evidence.²⁶⁷ The record is virtually devoid of direct evidence that Elavon acted intentionally to string along ATMMS. To be sure, Carmichael admitted that her team wanted to keep ATMMS as a partner and took actions with that aim, such as requesting amnesty.²⁶⁸ But I find that Elavon did not mean to convey that it would offer ATMMS EMV-compliant technology by the liability-

²⁶⁵ ECF No. 136 at 135:25–136:2.

²⁶⁶ See, e.g., ECF No. 136 at 189:9–192:20.

²⁶⁷ See *Halcrow*, 302 P.3d at 1153.

²⁶⁸ ECF No. 136 at 135:25–136:2, 137:20–22; Tr. Ex. 32.

1 shift date or any date certain. The deposition testimony—especially that of Bob Morris, who no
 2 longer works for Elavon—lends support to this notion. As do some of the carefully crafted
 3 emails and agreements characterizing the dates as moving targets²⁶⁹ and the fact that the product
 4 was being developed for a wide variety of customers, not just ATMMS.²⁷⁰ Plus, Poggi
 5 previously testified that he did not think Elavon acted intentionally and only at trial claimed
 6 otherwise.²⁷¹ And he even sent an email to the Elavon team in 2016 expressing gratitude for its
 7 work on EMV compliance.²⁷²

8 The evidence on Elavon’s potential motivation also casts doubt on Elavon’s
 9 intentionality. Surely Elavon had a financial motivation to keep ATMMS as a client, but
 10 ATMMS’s lack of compliance with EMV also hurt Elavon’s bottom line, as it earned fees from
 11 ATMMS’s sub-merchants’ transactions. Also, some evidence suggests that Elavon’s direct-
 12 certification option—something Poggi testified that he would have pursued if Elavon re-offered
 13 it to him²⁷³—was mostly EMV compliant by the liability-shift date.²⁷⁴ Why would Elavon
 14 intentionally mislead ATMMS about Converge to keep it as a customer if it could have simply
 15 told Poggi that direct certification would satisfy his EMV needs? The record suggests no answer
 16 that provides this court with a firm conviction that Elavon acted purposefully.²⁷⁵

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 18
 19 ²⁶⁹ See, e.g., Tr. Ex. 31; Tr. Ex. 39.

20 ²⁷⁰ Przybylek Dep. at 9:16–20, 42:18–43:2.

21 ²⁷¹ ECF No. 140 at 215:23–25.

22 ²⁷² Tr. Ex. 288.

23 ²⁷³ ECF No. 140 at 197:22–25, 200:18–21, 203:17.

²⁷⁴ ECF No. 137 at 227:18–20.

²⁷⁵ Even though Elavon knew that its representation was false, ECF No. 152 at 11, ATMMS must still separately show this element.

1 Having failed to prove the element of intentionality, I find that Elavon is not liable for
 2 fraud. But, as ATMMS proved every element of its negligent-misrepresentation claim—false
 3 misrepresentation, negligence, justifiable reliance, and resulting harm—I enter judgment on that
 4 claim against Elavon and in favor of ATMMS.

5 **B. ATMMS’s contract-based claims fail because the evidence does not show that**
 6 **the parties formed a contract about software.**

7 ***1. The parties did not agree on the essential terms of the contract.***

8 ATMMS also brought a claim for breach of contract, alleging that Elavon breached its
 9 oral agreement to “be ready for the transition to EMV global payment standard.”²⁷⁶ The
 10 formation of a contract requires “an offer and acceptance, meeting of the minds, and
 11 consideration.”²⁷⁷ The parties’ minds have met if they “have agreed upon the contract’s essential
 12 terms,” and what those terms are “depends on the agreement and its context and also on the
 13 subsequent conduct of the parties, including the dispute which arises and the remedy sought.”²⁷⁸

14 In light of the contours of the parties’ dispute, I find that the essential terms of the alleged
 15 oral agreement include Elavon’s providing an EMV-compliant software solution that allowed
 16 ATMMS to process transactions through Converge by the liability-shift date and, when that
 17 failed, in a reasonable time. The complaint alleges that “Elavon agreed . . . that it would be
 18 ready for the transition to EMV,” and the dispute at trial centered on Elavon’s responsibilities for
 19 ensuring that ATMMS could process EMV transactions. Poggi’s testimony—plus the
 20 documentary evidence that some of its business dried up in the last quarter of 2015—also

21 _____
 22 ²⁷⁶ ECF No. 39 at ¶ 74.

23 ²⁷⁷ *Certified Fire Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 255 (Nev. 2012) (citing *May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005)).

²⁷⁸ *Id.* (citing Restatement (Second) of Contracts § 131 cmt. g (1981)).

1 evinced the importance of ATMMS's securing EMV technology by the October 2015 liability-
2 shift date.

3 Though these terms were essential, ATMMS failed to prove that the parties agreed to
4 them. Poggi testified that the parties entered into an agreement, but I do not find that testimony
5 credible or persuasive. It may be true that Elavon made oral representations to Poggi, but I do
6 not find that those representations amounted to an agreement. While Elavon misrepresented what
7 it planned to provide ATMMS, nothing in the documents corroborates that the parties entered
8 into a contract or agreed to these terms on a specific timeline. In light of the frequency of email
9 exchanges between the parties and the fact that they entered into multiple written agreements, it
10 strains credulity that no one on either side would at least send an email listing the essential terms
11 of the contract at some point in the parties' yearslong relationship. And the regular
12 advertisement and update-style emails, most of which were sent to many organizations, do not
13 show that the parties specifically entered into an agreement. Plus, Eric testified—and ATMMS
14 argues—that Elavon never intended to offer the Commerce SDK/Converge solution by the
15 liability date. This calls into question why Elavon would enter into an agreement that it would
16 provide a non-direct software solution by a date certain with no intention of performing under
17 that agreement. If Elavon merely wanted to keep ATMMS's business, it could have offered the
18 direct-integration solution.²⁷⁹

21 ²⁷⁹ Though ATMMS brings no claim as to the Commerce SDK agreement, to the extent ATMMS
22 also theorizes that, regardless of its meeting the liability-shift deadline, Elavon orally agreed to
23 develop Commerce SDK in a reasonable timeframe, I find that this theory fails for lack of
breach. Elavon delivered a solution around a year after the parties entered into the Commerce
SDK agreement, and Poggi sent an email showing gratitude for that work—undermining the idea
that Elavon didn't fulfill its end of any purported bargain. *See* Tr. Ex. 186; Tr. Ex. 188.

1 2. *Because there was no contract, the bad-faith claim also fails.*²⁸⁰

2 ATMMS's claim for breach of the covenant of good faith and fair dealing fails for lack of
3 a contract. "[E]very contract imposes upon the contracting parties the duty of good faith and fair
4 dealing."²⁸¹ ATMMS based its bad-faith claim on the duty "[i]mplied in the oral agreement"²⁸²
5 that I find never existed. With no contract, there's no implied covenant of good faith and fair
6 dealing. So I find that ATMMS failed to prove its bad-faith claim.

7 C. **ATMMS lacked proof of intent to support its contractual- and business-**
8 **relations claims.**

9 ATMMS asserts claims for intentional interference with contractual relations and
10 prospective business relations. Its contractual-relations claim requires proof of (1) a valid and
11 existing contract; (2) Elavon's knowledge of the contract; (3) intentional acts intended or
12 designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5)
13 resulting damage.²⁸³ The prospective-business-relations claim similarly has five elements: (1) a
14 prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the
15 defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the
16 relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to
17 the plaintiff as a result of the defendant's conduct.²⁸⁴ As the Ninth Circuit previously held in this
18 case, to prove the intent elements of both claims, ATMMS must show that Elavon either
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20 ²⁸⁰ Elavon based its bad-faith claim on the oral contract, not on the written Commerce SDK
21 agreement. So I do not address whether Elavon breached the covenant of good faith and fair
22 dealing in that written agreement.

22 ²⁸¹ *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 862 P.2d 1207, 1209 (Nev. 1993).

23 ²⁸² ECF No. 39 at ¶ 84; ECF No. 146 at 26.

²⁸³ *J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003).

²⁸⁴ *In re Amerco Derivative Litig.*, 252 P.3d 681, 702 (Nev. 2011).

1 “desire[d] to bring . . . about” the interference or knew “that the interference [was] certain or
2 substantially certain to occur as a result of [its] actions.”²⁸⁵

3 Applying this standard, I find that ATMMS failed to prove intent at trial. Rather, the
4 evidence shows that the parties maintained a strong relationship, and Elavon’s motive (if any)
5 was to keep ATMMS as a customer, not to harm it or disrupt its business relationships. Indeed,
6 Elavon’s relationship with ATMMS was mutually beneficial, as ATMMS brought something
7 different to the table than any of Elavon’s other clients²⁸⁶ and Elavon stood to gain every time an
8 ATMMS customer processed a transaction. Even Poggi did not believe that Elavon acted
9 intentionally until trial.²⁸⁷ So I find that ATMMS didn’t prove that Elavon acted intentionally.

10 Nor did ATMMS prove that Elavon knew that its actions would impede ATMMS’s
11 existing or prospective business relationships. ATMMS’s actions told Elavon otherwise: it stuck
12 with Elavon even after learning that it would not support the original equipment and learning that
13 it would not support EMV through Converge by the liability-shift date. And it stuck with the
14 Commerce SDK/Converge option, rather than pursuing the direct-certification path, throughout
15 the parties’ relationship. Even if ATMMS didn’t know it could switch to the more direct option,
16 the inquiry is about Elavon’s subjective state of mind. Viewing the situation from Elavon’s
17 perspective, it could fairly assume that ATMMS would alter course to keep its business
18 relationships from suffering. Because it didn’t, Elavon had little reason to know that its

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22 ²⁸⁵ ECF No. 108 at 7–8.

23 ²⁸⁶ ECF No. 137 at 158:17–25, 178:4–6; Morris Dep. at 21:30–22:6.

²⁸⁷ ECF No. 140 at 215:23–25.

(in)actions would harm ATMMS's business. So I find ATMMS's intentional-interference claims unproven.²⁸⁸

D. ATMMS's claims under the theory that Elavon failed to provide EMV PIN-debit technology weren't proven.

Having addressed the claims that are based on ATMMS's theory that Elavon failed to deliver EMV compliance at all by the liability-shift date, I now address the claims based on the theory that Elavon failed to deliver EMV PIN debit at any point during the parties' relationship. I find that Elavon did not represent—let alone, enter into an agreement—that Commerce SDK would specifically support PIN debit by the liability-shift date. Little, if any, of the documentary evidence before October 2015 even addressed that particular technology, and the evidence of any oral agreement is too ambiguous to infer any contract. Plus, Poggi testified that he believed Elavon's representations only in part²⁸⁹—suggesting that he did not actually rely on purported promises that Elavon would deliver every type of EMV functionality by the liability date. Though Elavon may have represented that the technology would come in a reasonable time after the EMV compliance deadline, any reliance on such a representation was not justified: Elavon missed the liability-shift date for Converge EMV technology, Poggi knew that Elavon prioritized work in Canada, and Elavon kept pushing its target dates. These red flags would have put a reasonable person on notice that PIN-debit functionality would not be timely.²⁹⁰ Regardless, the EMV PIN-debit theory suffers from a lack of causation: ATMMS's business losses appear to

²⁸⁸ I also find that ATMMS failed to prove that Elavon had knowledge of any prospective business relationship. The evidence of Elavon's knowledge of existing contracts is slim too. That Elavon knew about ATMMS's "niche" services does not mean that it knew of specific prospective relationships. ECF No. 146 at 24.

²⁸⁹ *Id.* at 87:10–15.

²⁹⁰ *Collins*, 741 P.2d at 821.

1 have stemmed from the failure to be EMV compliant at all by 2015. And it remains unproven
2 whether ATMMS could have retained that business if it had some EMV functionality, even if not
3 PIN-debit support, by that date. Finally, I find that Elavon did not act with knowledge or intent.
4 So no claim based on the EMV PIN-debit theory was proven at trial.

5 **E. ATMMS didn't prove its claims under its hardware theory.**

6 ATMMS's final theory—that Elavon failed to deliver EMV compliant L5200 terminals—
7 suffers from similar defects as its EMV PIN-debit one. As to the misrepresentation claims
8 specifically, the Ninth Circuit affirmed the dismissal of the fraud claim on this theory for lack of
9 “evidence showing that Elavon knew that its representations about the Equinox L5200 were false
10 when made in 2013.”²⁹¹ The negligent-misrepresentation claim suffered from a similar dearth of
11 proof at trial, as the evidence revealed almost no evidence that statements about the L5200s were
12 communicated even negligently. Though Elavon initially offered those devices as the EMV
13 solution to its customers, it adjusted its messaging once it realized that it would instead support
14 the iSC250s. There is no persuasive evidence that Elavon should have known that it would not
15 support the L5200 or that it significantly delayed the announcements about the switch.

16 The contract claims also fail under this theory. Though Elavon didn't provide EMV-
17 supported L5200s, it eventually offered the iSC250s as an alternative.²⁹² ATMMS ultimately
18 accepted that alternative, and Elavon swapped the devices out at a discount, recognizing that
19 ATMMS used the L5200s for multiple years but that it expected them to be Elavon's supported
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23 ²⁹¹ ECF No. 108 at 6.

²⁹² ECF No. 137 at 107:17–23.

1 EMV solution.²⁹³ Also, as I found that Elavon did not act negligently, ATMMS cannot show
2 that Elavon acted in bad faith.

3 Finally, ATMMS failed to prove intent—for the same reasons it failed to do so as to the
4 other theories—and causation. Indeed, the cause of ATMMS’s harm was not a lack of
5 equipment, as it had L5200s and then iSC250s to support its customers; rather, the lack of
6 software for those devices to process EMV-compliant transactions through MCC caused its
7 harm. So ATMMS’s equipment theory fails.

8 **II. ATMMS is entitled only to nominal damages because it failed to satisfy its burden to**
9 **show a reasonably accurate amount of damages.**²⁹⁴

10 Under Nevada law, the plaintiff must prove the amount of its damages with “substantial
11 evidence”²⁹⁵—that is, provide an “an evidentiary basis for determining a reasonably accurate
12 amount of damages.”²⁹⁶ Though the calculation of damages “need not be proven with
13 mathematical certainty, testimony on the amount may not be speculative.”²⁹⁷ If the plaintiff
14 “prove[s] a right to damages without proving the amount,” it is entitled to nominal damages
15 only.²⁹⁸

19 ²⁹³ *Id.*

20 ²⁹⁴ In any event, the evidence appears to show that ATMMS was already made whole with
21 respect to the equipment in the form of the swap to the iSC250s and, to the extent it was not,
22 ATMMS offers no reasonably accurate way to measure the disparity.

22 ²⁹⁵ *Alper v. Stillings*, 389 P.2d 239, 240 (Nev. 1964).

22 ²⁹⁶ *Mort Wallin of Lake Tahoe, Inc. v. Com. Cabinet Co.*, 784 P.2d 954, 955 (Nev. 1989).

23 ²⁹⁷ *Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 168 P.3d 87, 97 (Nev. 2007).

²⁹⁸ *Alper*, 389 P.2d at 240.

A. Poggi's testimony does not constitute substantial evidence of the amount of damages.

At trial, ATMMS's damages case relied predominantly on Poggi's testimony. He testified that he calculated the damages due to Elavon's failures at \$5,807,635.74 up through November 28, 2018, plus \$120,332.80 (for losses related to quasi-cash services) and \$67,069.09 (for losses related to other services) per month thereafter.²⁹⁹ He added that he reduced these numbers to a writing in 2018 based on ATMMS's business records—records that were not presented as evidence.³⁰⁰ He also explained that his figures account for not only the fees ATMMS received from Elavon but also a 7% transaction fee paid by cardholders who use their services.³⁰¹

In pointing to this testimony,³⁰² ATMMS essentially asks me to blindly trust that Elavon's actions caused it millions of dollars in losses. Though ATMMS argues that Poggi's figures represent “nothing more than a simple math calculation based on the history of lost transactions, the amount of those transactions, and the anticipated fees,”³⁰³ Poggi provided scant detail about the purported bases for his computations and leaves this court with key questions unanswered like: What transactions were lost, and how much were they for? What business records are these based on, and where are they? Does the 7% fee apply to all transactions, or did Poggi simply use that “easy figure[]”³⁰⁴ as an example or for just some transactions? Are the

²⁹⁹ ECF No. 140 at 122:6–124:9, 126:8–19.

³⁰⁰ *Id.* at 124:25–125:12. That writing was not admitted as evidence but was used to refresh Poggi's recollection during trial. *Id.* at 125:19–24.

³⁰¹ *Id.* at 221:11–222:15.

³⁰² ECF No. 152 at 12–13.

³⁰³ *Id.* at 12–13.

³⁰⁴ ECF No. 141 at 221:19–20.

1 prospective losses indefinite, and do they account for ATMMS's changes in overhead costs? Do
2 the figures even represent profits or merely revenue?³⁰⁵

3 Perhaps if Poggi were an accountant or had otherwise established some evidentiary
4 foundation for his calculations and assumptions, his testimony alone could constitute sufficient
5 evidence of damages. But he earned an associate degree in general education³⁰⁶—not
6 accounting, business, finance, or the like. And, though he has many years of experience in
7 management, including as the general manager of ATMMS, he merely “interact[s] with [its]
8 accounting department”³⁰⁷ and did not testify as to any experience in calculating any financial
9 figures for ATMMS apart from this litigation. So, while he may meet the personal-knowledge
10 requirement of Rule 602,³⁰⁸ his testimony does not persuade me to accept his unsupported
11 figures as anything more than speculation.

12 **B. No other evidence allows the court to calculate a reasonably accurate amount**
13 **of damages.**³⁰⁹

14 ATMMS does not appear to rely on Carter's minimal testimony on damages—and for
15 good reason. Carter merely testified that ATMMS processed \$5 million per month in customer
16 payments with \$2 million per month in profits (or 40% of processing volume) before the
17 liability-shift date and now processes only \$500,000.³¹⁰ But Carter never testified to ATMMS's

19 ³⁰⁵ ATMMS notes that Poggi's testimony was unrefuted. ECF No. 146 at 30. But the defendant
20 had no obligation to refute ATMMS's damages calculation until ATMMS met its own burden.

21 ³⁰⁶ ECF No. 140 at 139:20–23.

22 ³⁰⁷ *Id.* at 57:10–13, 21–25.

23 ³⁰⁸ Fed. Rule Evid. 602.

³⁰⁹ In light of the lack of evidence, I need not and do not reach Elavon's argument that ATMMS
failed to mitigate damages. ECF No. 149 at 24.

³¹⁰ ECF No. 136 at 39:24–40:9, 41:19.

1 current profits, leaving me to speculate whether they still are 40% percent of revenue or more (or
2 less) in light of changes in overhead costs like staffing.³¹¹ Even if Carter had supplied that
3 missing information, his estimates reflect an inflated sense of reality: ATMMS’s processing
4 through Elavon topped out at \$4.16 million in March 2015 and hovered around \$3.5 million in
5 the months before and after—well shy of the \$5 million figure Carter testified to.³¹² And, like
6 Poggi, Carter’s position (CEO) and job requirements (“oversee[ing] everything” and doing “all
7 the contracts and negotiations”)³¹³ suggest that his view of damages is a big-picture one, too, and
8 he also offers no explanation of his estimates and provides no documentary evidence to support
9 it.

10 The only evidence that might allow me to calculate damages in a reasonably accurate
11 way is the spreadsheet of ATMMS’s processing through Elavon—an Elavon business record.³¹⁴
12 This spreadsheet includes columns for each month between 2013 and 2018 listing the number of
13 merchants; active merchants, i.e., those that processed transactions; the total amount in
14 transactions ATMMS processed through Elavon; the number of transactions; and the amount of
15 money Elavon paid ATMMS in residuals.³¹⁵ And it shows a decline in merchants and volume in
16 the last quarter of 2015—right after the liability-shift date.³¹⁶ But the spreadsheet also shows
17 that the downturn started (albeit, not as precipitously) *before the liability shift* in early 2015 and
18 illustrates significant fluctuations in processing volume both before and after October 2015,

20 ³¹¹ *Id.* at 42:8–9.

21 ³¹² Tr. Ex. 280.

22 ³¹³ ECF No. 136 at 15:6–18.

23 ³¹⁴ Tr. Ex. 280.

³¹⁵ ECF No. 137 at 144.

³¹⁶ Tr. Ex. 280.

1 making it impractical for this court to untangle how much of ATMMS's loss was driven by
2 Elavon's failures versus other factors such as issues internal to ATMMS and market volatility.
3 The record is devoid of evidence to address this concern. Also, the spreadsheet doesn't include
4 information about fees from cardholders, which appear to make up the vast majority of
5 ATMMS's purported damages, or information after 2018. So, because doing so would amount
6 to speculation, I cannot calculate ATMMS's damages from the spreadsheet either.

7 While ATMMS proved that Elavon caused it some harm, the court is left without
8 sufficient evidence to put a dollar figure on that harm. With no way to bridge that evidentiary
9 gap, I award ATMMS only nominal damages of \$1.

10 **C. Punitive damages are unwarranted.**

11 The evidence also does not support a punitive-damages award. Exemplary damages are
12 available if "the plaintiff proves by clear and convincing evidence that the defendant is guilty of
13 oppression, fraud or malice, express or implied."³¹⁷ "[T]o justify punitive damages, the
14 defendant's conduct must have *exceeded* mere recklessness or gross negligence."³¹⁸ But, as I
15 found that ATMMS proved its negligent-misrepresentation but not fraud claim, I likewise find
16 that Elavon's actions arose from bad business practices that amount to mere negligence;
17 ATMMS did not prove that Elavon acted with the intent to injure it or a "conscious disregard" of
18 its rights.³¹⁹ So I find that an award of punitive damages is not available on this record.

21 ³¹⁷ *Garcia v. Awerbach*, 463 P.3d 461, 464 (Nev. 2020).

22 ³¹⁸ *Id.* (emphasis in original).

23 ³¹⁹ *Id.* (defining oppression, fraud, and malice to variously require acting with intent to injure or
"a conscious disregard" of another person's rights or property and equating a "conscious
disregard" with "knowledge of the probable harmful consequences of a wrongful act and
willfully and deliberately fails to act to avoid those consequences") (cleaned up).

Conclusion

Based on these findings of fact and conclusions of law, and with good cause appearing and no reason for delay, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- **Final judgment is entered in favor of Plaintiff JB Carter Enterprises, LLC dba ATM Merchant Systems and against Defendant Elavon, Inc. on the plaintiff's claim for negligent misrepresentation based on the theory that Elavon failed to deliver an EMV solution by October 2015 in the amount of \$1; but**
- **Final judgment is entered in favor of the defendant and against the plaintiff on all other claims and theories.**

This order leaves no claims pending, so the Clerk of Court is directed to **ENTER FINAL JUDGMENT accordingly and CLOSE THIS CASE.**



U.S. District Judge Jennifer A. Dorsey
August 11, 2023